

1990

Roger T. Sharp v. L.D. Baker and Baker Engineers, Inc a Utah corporation: Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 900185-CA IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

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ROGER T. SHARP,

Plaintiff/Respondent.

vs.

L. D. BAKER and BAKER ENGINEERS, INC
a Utah corporation,

Defendant/Appellant.

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CASE NO. 900185-CA

SUPPLEMENTAL BRIEF OF APPELLANT

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LED

JAN 9 1991

T. Noonan
the Court
of Appeals

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2805 South State Street
Salt Lake City, Utah 84115
Telephone: 486-2054

IN THE UTAH COURT OF APPEALS

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ROGER T. SHARP and TERRIE LEE SHARP, :
:
Plaintiffs/Respondents :
:
vs. : SUPPLEMENTAL BRIEF OF APPELLANT
:
LESTER D. BAKER and BAKER ENGINEERS, : Case No. 900185-CA
:
Inc., a Utah corporation. : Argument Priority (14)
:
DEFENDANTS/Appellants. :
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Summary Judgment should not have been granted and the Court then improperly refused to set aside that default, is the question which is presented for Appellate Review.

Roger T. Sharp is an Attorney licensed in the State of Utah and lives in a home titled only to his wife Terrie L. Sharp (see exhibit A from Edit 1 Book 5624 page 11548 located at 5757 S. Holladay Blvd) Baker filed a lien for \$615.00 for engineering services performed on a retaining wall and for obtaining a building permit (Exhibit B). Sharp sued in his own name for slander of title after sending a check to Baker for \$160.00 marked on the face payment in full. It was negotiated and the question is presented whether that constitutes satisfaction and accord. Sharp moved for summary judgment after Baker filed an answer and counterclaim. Sharps affidavit contained false facts such as "Baker did nothing for me" etc and the counter affidavits of Baker & his attorney were weak as his attorney was by this time protecting his personal interest contrary to Baker's. They were also late and the court ruled them insufficient.

A. Recent Case Cited:

On December 6, 1990 the Utah Supreme Court in the case of Allen v. Ortez (No. 890098) made a significant ruling on granting of Summary Judgment as follows:

"We begin by noting the applicable standard of review. Summary judgment is appropriate only when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); eg, Landes v. Capital City Bank, 795 P. 2d 1127, 1129 (Utah 1990); Utah State Coalition of Senior Citizens v. Utah Power & Light, 776 P. 2d 632, 634 (Utah 1989). On appeal from summary judgment, we give no particular deference to the trial court's conclusions of law and review them for correctness. E.g., Landes, 795 P. 2d at 1129; Madsen v. Borthick, 769 P. 2d 245, 247 (Utah 1988).

B. Statement of Relevant Facts.

This memoranda is deemed necessary as opposing counsel for the Plaintiff/Respondents is demanding that the appeal be dismissed because I did not get into the facts of the case.

1. Sharp filed a complaint alleging he owned the property in question when in fact he has no interest and the property is held in the name of his spouse. (See attached exhibit A an official printout from the Salt Lake County Recorder) He amended to include his wife at the time he took the default judgment or summary judgment as he prefers to call it. A motion to amend in such a material matter must be brought and granted and responded to before the moment of granting the summary judgment.

2. The fundamental rule in 56 (c) cases seems simple enough: Summary judgment should be granted where there is "no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law"

3. Rule 56 (c) indicates that the source of facts for a motion for summary judgment include "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits if any." Dupler v. Yeates, 10 Utah 2d 251, 351 P.2d 624 (1960) says in effect that a mere denial in a pleading is not enough to create a dispute of fact against affidavits. Rule 56 (e) has been discussed in a number of Utah cases and seems to say that the acid test for the form of affidavits is whether the evidence is in a form which would be admissible at trial with appropriate foundation and personal knowledge. The affidavit of L D Baker sets forth specifically that he did do work for the Plaintiff and that is supported by exhibit B attached which is a plan approved by the Salt Lake County Building inspector clearly bearing the engineering stamp of Lester D. Baker. This shows Plaintiff lied in his

affidavit wherein he swears Lester D. Baker did no work for him and so was not entitled to the money claimed in his billing and lien. This is a material question of fact and is properly raised. The payment check was for this work and also supports the proposition that work was done. That raised the legal question whether a statement on the face of the check for a sum certain was full satisfaction.

4. In *Anderson v. Liberty Lobby, Inc* 477 U.S. at 256, 106 S. Ct at 2514, 91 L. Ed.2d at 216-17 the question was presented whether the clear and convincing evidence requirement (in a libel case where malice was required) could be employed by the trial court in deciding to grant summary judgment. The Court held that the trial burden of proof should be considered by the trial court in deciding summary judgment motions. In *Celotex Corp v. Catrett* 477 U.S. at 324, 106 S. Ct at 2553, 91 L. Ed.2d at 274 the issue was who has what burden in the summary judgment context. On Certiorari, the Supreme Court reversed and remanded the case, holding that it was not necessary for the movant to produce evidence negating the opponent claim in order to shift the burden to the nonmovant.

It seems clear that there were disputed facts material to the determination of the case and that the court was clearly in error in granting summary judgment. Further the court compounded the error by granting judgment against the person doing the work and seeking only to collect his fee by asserting his lien against the property benefited. That the Plaintiff was an attorney makes more inexcusable the attorney's refusal to pay a just debt and using a technicality to defeat the claim of the engineer.

DATED this - day of November, 1990.




MAILING CERTIFICATE

MAILING CERTIFICATE

This is to certify I served the original memoranda on the plaintiff by mailing a true copy thereof, postage prepaid to their attorney Mark F. James at 185 South State Street, Suite 1300, P.O. Box 11019, Salt Lake City, Utah 84147 on November 28, 1990. I then served the two pages comprising the first two pages being the only amendment by delivering a true copy to the office of Mark F. James on January 4, 1991 and now I have served again the document entitled Supplemental Brief of Appellant being now printed on both sides of the paper by mailing a true copy to Plaintiff's attorney Mark F. James at 185 South State Street, Suite 1300, P.O. Box 11019, Salt Lake City, Utah 84147 on January 7, 1991, postage prepaid.

DATED this 7th day of January, 1991.



VTDI 22-14-152-006-0000 DIST 18
SHARP, TERRIE L

PRINT U UPDATE
LEGAL

TOTAL ACRES	1.00
REAL ESTATE	110000
BUILDINGS	196580
MOTOR VEHIC	0
TOTAL VALUE	306580

5757 S HOLLADAY BLVD EDIT 1 BATCH NO 0
SLC, UT — 841211509 BATCH SEQ 0

LOC: 5757 S HOLLADAY BLVD EDIT 1 BOOK 5624 PAGE 1548 DATE 02/19/85
SUB: TYPE UNKN PLAT

PROPERTY DESCRIPTION

BEG 203.35 FT N & 243 FT W FR SE COR OF SW 1/4 OF NW 1/4,
SEC 14, T 2S, R 1E, S L M; N 47°47' E 240.2 FT; W 192 FT; S
239.3 FT; E 172 FT TO BEG. 1 AC 4768-0408 5312-0883
5528-0254

Exh. b. + 2

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(NO CONCRETE)

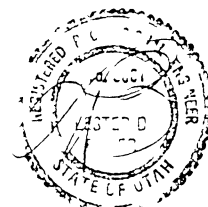
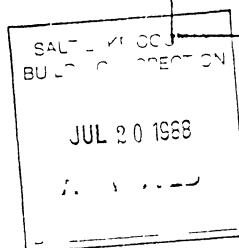
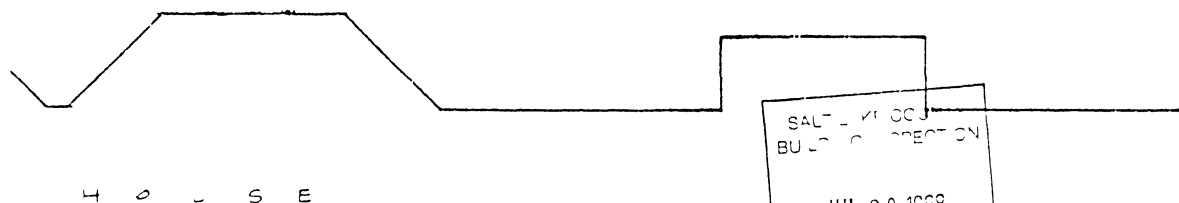
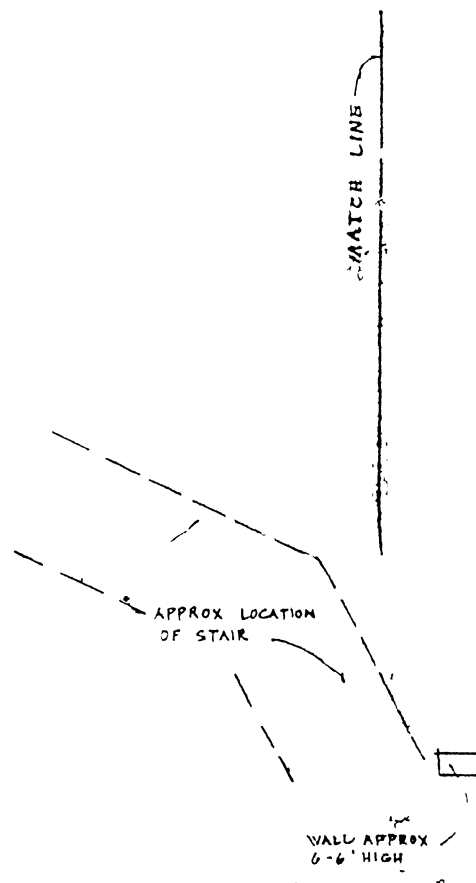
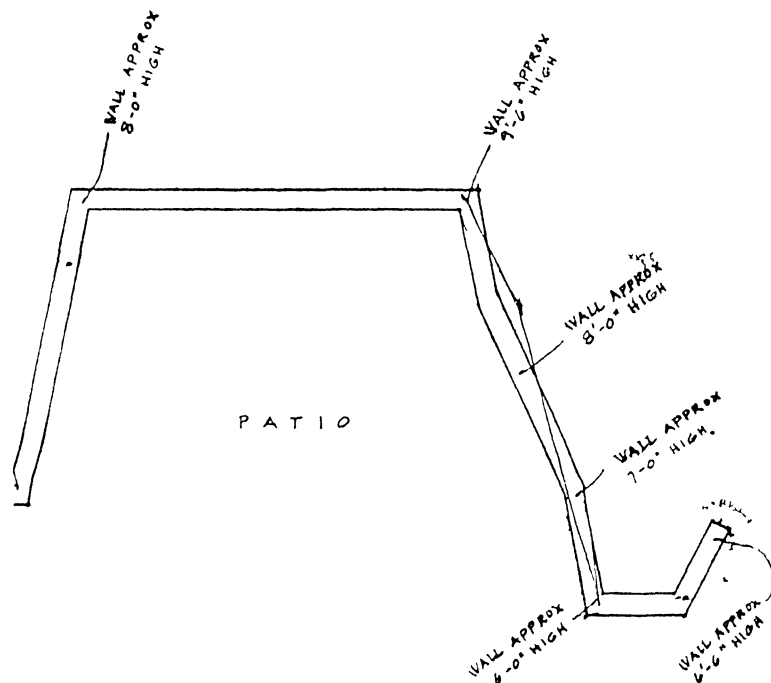
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744 OR JOE PATRICK 485-3771

INITIAL

BOX



NOTE
All partitions are to be 3/4
unless noted otherwise

EX 104 B